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DeFunis v. Odegaard: AN INVITATION TO LOOK BACKWARD

By WALTER J. LEONARD*

In 1850 a Black man by the name of Benjamin Roberts initiated a suit against the City of Boston¹ because his five year old daughter, Sarah, was not allowed to enroll in a white school. After having presented his daughter on several occasions for registration in one of the "white only" schools, and after having petitioned the Massachusetts Legislature and the Boston School Committee to no avail, Mr. Roberts was forced to take a daring action, whose results affect us to this day. The State Constitution, argued Roberts, prohibited segregation and unequal treatment of Massachusetts citizens. By denying Sarah the right to enroll in a white school, therefore, the Boston School Committee was inflicting both segregation and unequal treatment upon her, and was thus in direct conflict with Constitutional provisions.² In addition to the legal implications, what most vexed Sarah's father was that on her way to school — the Black school, the only one to which she was admitted — Sarah had to walk past five different white schools.³

Although eminent lawyers, Charles Sumner and Robert Morris, argued these points eloquently, Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts was not persuaded. Based on logic that obfuscated the issues of equality and nonsegregation, he ruled in favor of the City of Boston, and more importantly laid the foundation for the more profound and extensive "separate but equal" decisions of the Supreme Court of the United States.⁴

The issues raised by Benjamin Roberts have haunted the American judicial process for more than 100 years. By ruling against little

Sarah Roberts, the Massachusetts court set a precedent by which the United States Supreme Court could formulate its pervasive exclusionary doctrine as expressed most odiously in *Plessy v. Ferguson* in 1896. It was an easy step from Chief Justice Shaw's declaration that ". . . the good of both classes of schools will be best promoted by maintaining the separate primary schools for colored and for white children,"⁵ to the ruling in *Plessy v. Ferguson* that extended this doctrine to transportation facilities, eventually to all areas of life. "We cannot say," the majority opinion reads, "that a law which authorizes or even requires the separation of the two races in public conveyances is unreasonable, or more obnoxious to the Fourteenth Amendment than the acts of Congress requiring separate schools for colored children in the District of Columbia, the constitutionality of

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1. *Roberts v. City of Boston*, 59 MASS. (1850).
 2. Cushing, 198 *Reports of Cases Argued and Determined in the Supreme Court of Massachusetts*, (1853).
 3. Levy & Phillips, "The Roberts Case: Source of the Separate but Equal Doctrine." *AMERICAN HISTORICAL REVIEW* 512 (April, 1951)
 4. *Supra*, note 1.
 5. Richard Bardolph, editor, *The Civil Rights Record: Black Americans and the Law, 1849-1970*. 17 (1970).

which does not seem to have been questioned, or the corresponding acts of State legislatures."⁶

Implicit in these court decisions was the lawmakers' belief in the innate inferiority of Black men and women. Although this belief initially provided the bases for the rulings, as time went on, lawmakers were forced to insist defensively upon the concept of inferiority in order to maintain the laws. At last, it became incumbent upon leaders to prove inferiority in order that certain laws could be upheld.⁷ Sadly enough, this defensive posture is still with us, as the case of *DeFunis v. Odegaard*⁸ clearly shows.

It is in this briefly outlined historic framework that the case of *DeFunis* must be discussed. This most recent revival of the issue of race as a determining factor in school admission policy is not an isolated incident. Quite the contrary, the issue raised by Mr. DeFunis is, in the narrow sense, the responsibility of a law school to help compensate for these past injustices, and in the broad sense, the obligation of American society to make up for its centuries of assault on the educational

reach of the amendment." *Supra*, note, 5 at 59.

The next judicial retreat came in *U.S. v. Reese*, 92 U.S. 214 (1876), in which the Court invalidated key portions of the Enforcement Act of 1870 [41st Congress, 2nd Session (May 31, 1870), p. 95]. Resurrecting the misuse of neutral principles the Court concluded that "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen . . . over another, on account of race, color or previous condition of servitude."

In *Hall v. De Cuir* [95 U.S. 485 (1878)] the Court ruled as unconstitutional a State statute prohibiting segregation on steamboats operating on the Mississippi. The Court held that the Commerce Clause did not prohibit segregation, and that in the face of the supremacy of Federal law, a state (Louisiana) could not enact a non-discrimination statute if the results placed an undue burden on commerce.

The turn tail movement of the Court, reflective of the national opinion about Black people's rights, was nearly completed in 1883. In the Civil Rights Cases [109 U.S. 3 (1883)] the *Act of March 1, 1875* (18 Stat. 336, secs. 1,2), was held to be unsupported by the Thirteenth and Fourteenth Amendments. Thus, the provision that "all persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations . . . of inns, public conveyances . . . theaters, and other places of public amusement . . ." was invalid. Justice John Marshall Harlan (1833-1911) of Kentucky, dissented, as he did later in *Plessy*, establishing himself as the visionary conscience of a reactionary era.

7. Attitudes about Black people varied from that of outright hatred and venomous denunciation by many of the Old South's extreme racists, see, e.g., W. Sinclair, *The Aftermath of Slavery* (1905); T. Gossett, *Race: The History of an Idea in America* (1963); P. Barringer, *The American Negro: His Past and Future* (1900); W. Smith, *The Color Line: A Brief in Behalf of the Unborn* (1905); M. Avary, *Dixie After the War*, (1906); B. Tillman, *The Race Question*, 11 Van Norden's Magazine (1907). To that of so-called scholars like Joseph A. Tillinghast, *The Negro in Africa and America*, PUBLICATION OF THE AMERICAN ECONOMIC ASSOCIATION, 3d Sec. III (May, 1902). Even the Northern Abolitionists, for the most part, held a sort of "noble savage" image of Black people. The paternalistic attitudes of these men are demonstrated by the writings of Allen, *Africans in America and Their New Guardians*, CCXXXII CHRISTIAN EXAMINER, (1862); T. Higginson, Letters and Journals of Thomas Wentworth Higginson, (1921); C. Norton as quoted in *Broadside for Freedom*; NEW ENGLAND QUARTERLY, (September 1948); S. Cox, "Emancipation and the Results: Is Ohio to be Africanized?," *Congressional Record*, (June 6, 1862.) For some current attitudes and writings which have an affect (negative and positive) on policies, responses and evaluations of the educational status of Black people, see: Jensen, *The Differences Are Real*, PSYCHOLOGY TODAY, (December 1973); Jensen, *How Much Can We Boost I.Q. and Scholastic Achievement?*, HARVARD EDUCATIONAL REVIEW, (1969); Herrnstein, *I.Q.*, ATLANTIC MONTHLY, (September 1971); Herrnstein, *On Challenging Orthodoxy*, COMMENTARY, (April 1973); Etzioni, *The High-Schoolization of College*, WALL STREET JOURNAL, (March 17, 1970); Margolis, *The Two Nations at Wesleyan*, NEW YORK TIMES MAGAZINE, (January 18, 1970); Egerton, *State Universities and Black Americans*, SOUTHERN EDUCATIONAL REPORTING SERVICE, (May 1969); Jencks & Riesman, *The American Negro College*, HARVARD EDUCATIONAL REVIEW, (Winter, 1967); Jencks & Riesman, *The Academic Revolution*, (1968); *The Black Quota at Yale Law School*, Letters of Macklin Fleming and Louis Pollak, 19, (Spring, 1970); Shanker, *Where We Stand*, NEW YORK TIMES, (December 9, 1973); Graglia, *Special Admissions of the 'Culturally Deprived'*, 119 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 351 (1970); N. Glazer & D. Moynihan, *Beyond the Melting Pot*, at 44-67 (1964); O. Coombs, *The Necessity of Excellence: Howard University*, 6 Change, at 36 (No. 2, March, 1974); Sowell, *The Great I.Q. Controversy*, CHANGE, at 33-37 (May, 1973); Kilson, *Blacks at Harvard: Crisis and Change*, HARVARD BULLETIN, (April 1973); H. Isaacs, *The New World of Negro Americans* (1963); D. Moynihan, *The Negro Family: The Case for National Action* (U. S. Dept. of Labor, Washington, D. C. 1965); R. Coles, *Children of Crisis*, (1967).
8. 82 Wash. 2d 11, 507 P. 2d 1169 (1973).

6. *Id.* p. 150. Because this article addresses itself to discriminatory judicial policies that apply to education, I have not included the myriad other court decisions that effectively emasculated all other rights of Black Americans. But we should not forget that in 1857, seven years after *Roberts*, the U.S. Supreme Court held, in *Dred Scott v. Sandford*, [19 How.393 (1857)] that the Black man was not entitled to citizenship. Moreover the Black man was not capable of societal and community membership with the concomitant bundle of rights pertaining to such status. Extending this logic, Chief Justice Roger Taney wrote: "The question before us is, whether the class of persons described in [this] plea [i.e. Negroes] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provided for and secures to citizens of the United States." [Bardolph, *The Civil Rights Record*, *supra*, note 5 at 17]. Following *Dred Scott*, the Civil War and the 13th, 14th, and 15th Constitutional Amendments promised to be curative measures. Optimism was unfounded, however. The Slaughter House Cases [16 Wall.36 (1873)] represented a judicial assault that reduced the Black man to a status of peasantry. In these cases the Court's opinion focused primarily on the Privileges and Immunities Clause of the 14th Amendment, virtually stripping it of any meaning for Black Americans. As Richard Bardolph describes the implications of the *Slaughter House Cases*, they enabled the Court to take the "position that state and federal citizenship are separate and distinct; that the amendment forbade state impairment of the privileges and immunities that persons enjoyed as citizens of the United States; that most civil rights are attributes of state citizenship and therefore beyond the

opportunities for Black citizens.

Before delving more specifically into the case brought by Marco DeFunis, we must recognize that the one unique aspect about the case is that it marks the first substantive challenge to the integrity of the American college and university admission processes. Quite simply put, Marco DeFunis, despite the fact that he had been admitted to four different law schools, attacked the University of Washington School of Law's decision not to admit him. Among the several grounds on which he based his suit were 1) the preferential consideration shown to minority applicants;⁹ 2) the committee's failure to give preference to Washington residents;¹⁰ and 3) the lack of consideration given to his highest LSAT score.¹¹

The trial judge dismissed all of DeFunis' contentions except his claim that some students — minority applicants — had been given preferential treatment contrary to the judge's reading of *Brown v. Board of Education*.¹² The trial court refused to accept, as valid, the law school's argument that as a component of the larger society, as a gateway to professional opportunity and as a state institution, the University of Washington had an obligation to admit and train persons representing the broad and diverse heterogeneity of the country's population. Further, the court therefore denied that years of active discrimination against minorities (consequently, in favor of non-minorities) made urgent the necessity to remove the blindfolds of neutral principles which had been unequally applied.¹³ The trial judge ordered DeFunis admitted.¹⁴ On appeal, the State Supreme Court reversed, holding that the University has a right to consider racial membership and minority status¹⁵ as a factor in arriving at the admissions decision.¹⁶ DeFunis, with the aid and backing of the Anti-Defamation League of B'nai B'rith petitioned the U. S. Supreme Court under the theory that the University's conduct violated the Equal Protection Clause of the Fourteenth Amendment,¹⁷ smacked of "reverse discrimination"¹⁸ and illegally established

preference for other than white students.¹⁸

The contentions of DeFunis and his supporters failed in at least three important particulars:

A. Preferential treatment of minority applicants.

The brief for DeFunis does not urge the court to notice the historic fact of racial exclusion and the preferential treatment of white applicants. For example, he does not note that although Black people have been attending and graduating from the nation's law schools since 1869,¹⁹ that discrimination in law schools was so rampant throughout the nation that Black citizens were compelled to bring suit for entry as early as 1938.²⁰ The *DeFunis* brief does not point to the additional Supreme Court suits that had to be filed in order to force universities to recognize that Black students had a right to obtain a legal education.²¹

9. It is of interest to note that *DeFunis* does not raise as central, the minority issue in its complaint to trial court, nor does it raise the point as to whether or not some of the students admitted with lower PFYA (Predicted First Year Averages) scores were non-minority group members.
10. Note that a complaint which attacks an alleged preference seeks the very treatment that it condemns.
11. Mr. DeFunis took the LSAT three times and scored as follows: 512, 566 and 668, from which three scores the law school took an average score of 582. DeFunis' writing scores were 62, 58 and 64, from which the law school took an average of 61.
12. *DeFunis v. Odegaard*, No. 741727, Oral Decision 2 (Washington Super. Ct. King County, Sept. 22, 1971). *Brown v. Board of Education*, 345 U. S. 483 (1954).
13. 82 Wash. 2d 1, 20, 21 (1973).
14. *supra*, note 12.
15. For our purposes, the term "minority," refers to those members of the society so classified by the U.S. Government, i.e. Black people, Chicanos (Mexican Americans), Native American Indians, Asian Americans, Spanish-Surname (speaking) Americans (Puerto Ricans, et. al.).
16. *supra*, note 13.
17. The Equal Protection Clause of the Fourteenth Amendment to the Constitution reads: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or prosperity, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. art. 14 1).
18. Petitioners' brief in the Supreme Court of the United States, October term, 1973, No. 73-235.
19. George Lewis Ruffin graduated from the Harvard Law School in 1869 and is considered to be the first Black man to have finished a prescribed course of legal studies.
20. *Gaines v. Univ. of Miss.*, 305 U.S. 337 (1938).
21. *Sipuel v. Univ. of Okla.*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *Hawkins v. Board of Control*, 347 U.S. 971 (1954).

At one time not too long ago, the absence of minority students from the nation's law schools was so glaring that a southern Senator, whose own state was an expert practitioner of segregation, raised an embarrassing question of the dean of one of our most prestigious law schools during a Senate Committee hearing on voter requirement in federal and state elections.²² The law school involved is now reputed to be the third largest educator of Black lawyers in the country.²³

Before 1964, the principle of benign neglect with respect to the admission of minority students could better be described as one of malignant retreat.²⁴ In fact it was not until 1964 that "... the AALS Committee on Racial Discrimination was able to state for the first time that 'no Association school reports denying admission to any applicant on the ground of race or color.'"²⁵ Still, as late as the 1969-70 academic year there were less than 3,100 minorities in the Country's law schools;²⁶ the total law school enrollment for that year was 86,028.²⁷ Even then many of the minority students were considered "special" and their role was frequently seen as "experimental."²⁸

B. *The consideration of racial identity as being violative of the Equal Protection Clause of the Fourteenth Amendment.*

The Fourteenth Amendment was intended to correct Congressional action by conferring both state and United States citizenship on those persons formerly held in slavery²⁹ and to cure an infirmity of the original Constitution as found by Chief Justice Taney in *Dred Scott* in his pronouncement that the framers of the Constitution never contemplated the possibility of Black people becoming citizens.³⁰

One of the most potent weapons in this new arsenal of legislation was the Equal Protection Clause. The thrust of the clause was against state action; particularly where the power of the state was used to deny, or to prevent a person from enjoying the benefits and rights of citizenship within its jurisdiction.³¹ That the laws of the state should be equally

applied was announced by the Court as early as 1886. "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibi-

22. Senator Sam Ervin (N.C.) and Dean Erwin N. Griswold exchanged the following words, as quoted in *Hearings Before the Subcommittee on Constitutional Rights of the Committee on the Judiciary*, United States Senate, Eighty-Seventh Congress, Second Session on S. 480, S. 2750, and S. 2979, March 27, 28; April 5, 6, 10, 11 and 12, 1962, U.S. Government Printing Office, Washington, 1962.

Senator Ervin. Well, I will put another question. I want to ask you what percentage of the enrollment in the Harvard Law School is non-white?

Dean Griswold. Senator, not as many as we would like to have. I would guess that it is about 3 percent — no, it is not, it is not nearly as much as that, it is not much more than 1½ or 2 percent.

Senator Ervin. And the Harvard Law School is a national law school, which draws its students from all over the country?

Dean Griswold. That is right.

Senator Ervin. And the non-white population of this country is about 10 percent. I think that you will agree with me that if the Harvard Law School has less than 3 percent non-white enrollment, that would not justify the inference that the Harvard Law School has discriminated against people on account of race or color?

Dean Griswold. No, I don't think so, Senator. There are other factors. There is the matter of entrance requirements and there are economic problems that affect the number that can come to Harvard and —

Senator Ervin. Well, in any case, wherever we seek to draw inferences from figures, do we not find there are usually or nearly always other factors than just the mere figures that we have to take account of?

Dean Griswold. Senator, any situation involving figures has to be approached intelligently. That does not mean that figures should not be utilized. They have to be used intelligently, of course.

Senator Ervin. I certainly appreciate very much, Dean, your coming here, and your complete willingness to answer all the questions that were put to you. We thank you for that and we hope that you have time to catch your plane.

23. Harvard Law School's minority enrollment for the current year, 1973-74, is: 166 Black students; 45 Chicanos; 13 Asian; 7 Native Americans; 8 Spanish-speaking students.

24. "The Law Schools and the Minority Group Law Students: A Survey for the A.A.L.S. Committee on Minority Groups," edited by Walter J. Leonard and Kellis E. Parker, published as part of the Proceedings of the 1970 Annual Meeting, Association of American Law Schools.

25. *supra*, note 24.

26. *supra*, note 24.

27. 23 JOURNAL OF LEGAL EDUCATION, 597 (No. 4, 1971)

28. Walter J. Leonard, "Another View of the Minority Student and the Law School," speech on file at Harvard Law School Library. A version of this speech was published in 1 *The Black Church*, (No. 1, 1972).

29. U. S. Const. art. 14. 2.

30. 19 Howard 393 (1857).

31. *Brady v. Maryland*, 373 U.S. 83 (1963); *Virginia v. Rives*, 100 U.S. 313 (1880); *Minneapolis Railway Co. v. Beckwith*, 129 U.S. 26 (1889).

tion of the Constitution."³² Thirteen years later (1899) the Court continued its feeble ways, finding that the state did not have to provide equal protection for Black children if to so do placed an unnecessary burden and hardship on the public purse.³³

Black citizens, primarily through the NAACP,³⁴ tried for several years, with moderate success, to persuade a vacillating Supreme Court to give a positive reading to the Equal Protection Clause. The Court, in other words, was asked to find that equal protection of laws went beyond the mere prohibition of acts to that of requiring state officials, and/or those acting for them, to provide equal opportunity to enjoy the protection of the laws. This negative trend continued however, and state officials were permitted to allow and, in many instances, assist in the denial of basic and equal protection to Black citizens. It was in 1938 that the Court's conscience became shocked by the shabby treatment of Black citizens, particularly in higher education. In *Gaines* the Court said, it is "manifestly the obligation of the State to give the protection of equal laws . . . where its laws operate, . . . within its . . . jurisdiction. [T]he equality of legal right must be maintained."³⁵

The practice and principle of separate but equal was not affected by the *Gaines* decision. Consequently, the provision of unequal facilities for both education and job opportunities continued unabated. One author observed, ". . . that the triumphs that began in 1938 with the *Gaines* case and culminated in *Brown* and its subsequent applications, still left the mass of Negroes untouched where it mattered: still languishing in second-class citizenship; still badgered by imputations of inferiority; still stamped with the mark of oppression and the insignia of poverty-squalid housing, job discrimination and other economic deprivations and exclusions, grossly inferior schools [*mainly understaffed, underfinanced and poorly equipped*], decaying [provisions] of health and welfare. Millions of Negroes felt more alienated, more rejected and hopeless than ever . . ."³⁶ (Emphasis added).

The disenchantment was forcefully stated in a criticism of the Supreme Court by Lewis M. Steel, who at the time was Associate Counsel of the NAACP. Steel said that the Court, like the rest of the country, "Never committed itself to a society based upon principles of absolute equality."³⁷

An affirmative mandate under the Equal Protection Clause with respect to education seems to have come into the Court's grasp by 1954.³⁸ As late as 1964, however, although urged to assume a different posture, it found that Congress acted properly under the Commerce Clause, rather than the Equal Protection Clause, when it passed and enacted the Civil Rights Act of 1964.³⁹

More recently, courts have approved classification on the basis of race, for ameliorative purposes where patterns and practices of covert and overt discrimination have prevented certain classes of individuals from free and equal participation in various school systems in the nation.⁴⁰ In considering whether race could be used as a factor, without overburdening constitutional permissibility Chief Judge Coffin, writing for a unanimous court in *Associated General Contractors v. Altshuler*, 42 U.S.L.W. 2320 (12/25/73) gave new vigor to the Constitution as a living document and rejected the idea of inflexibility in its application:

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32. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).
 33. *Cummings v. County Board of Education*, 175 U.S. 528 (1899).
 34. W. White, *A Man Called White*, (1948). The autobiography of the late Executive Secretary of the NAACP.
 35. 305 U.S. 337 (1938).
 36. Bardolph, *The Civil Rights Record*, op. cit., p. 427.
 37. L. Steel, *Nine Men In Black Who Think White*, *New York Times Magazine*, (Oct. 13, 1968).
 38. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McKissick v. Carmichael*, 187 F. 2d 949 (1951); *Fisher v. Hurst*, 333 U.S. 147 (1948); *Sipuel v. Bd. of Regents*, 332 U.S. 631 (1948).
 39. *Katzenback v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964); *Kennedy v. Pickrick Restaurant*, 234 F. Supp. 179 (N.D. Ga. 1964).
 40. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Springfield School Comm. v. Barksdale*, F. 2d 261 (1965); *U.S. v. Jefferson County Bd. of Educ.* 372 F. 2d 836 (1966); *Tometz v. Bd. of Educ.* 39 Ill. 2d 593 (1968); *School Comm. of Boston v. Bd. of Educ.* 227 N.E. 2d 729 (1967); *Booker v. Bd. of Educ.*, 45 N.J. 161 (1965).

"The first Justice Harlan's much quoted observation that 'the Constitution is colorblind . . . [and] does not . . . permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights', *Plessy v. Ferguson*, 163 U.S. 537, 554 (1896) (dissenting opinion) has come to represent a long term goal. It is by now well understood, however, that our society cannot be completely colorblind in the short term if we are to have a colorblind society in the long term. After centuries of viewing through colored lenses, eyes do not quickly adjust when the lenses are removed. Discrimination has a way of perpetuating itself, albeit unintentionally, because the resulting inequalities make new opportunities less accessible. Preferential treatment is one partial prescription to remedy our society's most intransigent and deeply rooted inequalities."⁴¹

The Equal Protection Clause does not deny the officials at the University of Washington, or other educational institutions, the right to adopt rational means of implementing initiatives by which citizens are to be accorded equal and full protection of equal laws; nor does it bar reasonable classification and the use of race as a factor or as an ingredient of those measures adopted to reach that objective. DeFunis was not deprived of any of his constitutionally protected rights when the state, recognizing a history of racial inequality, designed programs to eliminate it.⁴²

C. *The Law School Admissions Test (LSAT) and undergraduate grade point average (GPA) as sole criterion for admissions.*

No one with a thimble full of sense will mount an argument against the importance of undergraduate grade point averages (more particularly undergraduate academic performance) when one is being considered for extended and higher education. Not only does the GPA give some indication of the person's performance, but it indicates how well he or she has been able to navigate the intricacies of the academic mine field.

Usually, the college graduate, having spent those years between childhood and chronological maturity (17-21 or 18-22) in institutions of learning, emerges with the

cumulative evaluation of several different people: professors, counsellors, instructors, teaching assistants and other institutional officials.⁴³ A strong presumption, absent a hostile environment and assuming a school of strong academic standards, arises in favor of acceptance, as a valid history, of the grades shown on a student's transcript.

Admissions officers, worthy of their title, will not end the evaluation at the point of GPA. They are concerned about building a *class* of students. They are concerned that a class should have students of various backgrounds and, to the extent possible, as wide a geographic distribution as the pool of *qualified* applicants permits.

The next factor considered is normally the applicant's performance on the LSAT (Note that these letters stand for the Law School Admissions Test; the A is for *admissions* not *aptitude*). Unlike the GPA, which is a four-year record, the LSAT is a one-time thing. It is a half-day exercise developed and administered by the Educational Testing Service (ETS), a non-profit proprietary corporation, under policies decided upon in cooperation with the Law School Admissions Council (LSAC), also a non-profit proprietary corporation, the membership of which consists almost entirely of admissions officers from various law schools.

The LSAT is, according to ETS and the law school officials, designed to assess and predict how a person may perform during his or her *first year of law school*. However, ETS engages in a bit of puffing (less than accurate advertising) in its announcement bulletin. "The purpose of the LSAT," it says, "is to assess the probability that the applicants will be successful in the study of law."⁴⁴

41. *Associated General Contractors v. Altshuler*, ___ F. 2d ___ (1st Cir. Nov. 30, 1973).

42. *Brief of the President and Fellows of Harvard College, Amicus Curiae*, In the United States Supreme Court, October Term, 1973, No. 73-235, pp. 43-51.

43. Assuming that a student, on a semester system, has taken four courses per semester, over eight semesters, the GPA represents the collective opinion of 32 professors.

44. *Law School Admission Bulletin*, 1973-74, Princeton, N.J., Education Testing Service, 1973, p. 3.

The present importance of some sort of selection procedure and predictive test for admission to law schools began developing after World War II when the near-open admissions policy had to be suspended in the face of rising numbers of applicants. One author observing the long lines forming at the law school doors "during the past few decades and especially after World War II," says that a "more vigorous selection for admission to law schools has been necessary and desirable. One of the major problems in the selection process has been the identifying and use of an adequate predictor of success in law school." Partly because of the unavailability of a choice of a predictor, the Law School Admissions Test published by the Educational Testing Service has been used almost exclusively as a comprehensive test for use in the selection process.

Performance criteria of success in law school have traditionally been and continue to be grades obtained in formal course work. Researchers only intuitively recognize that grades have undesirable measurement characteristics. Very little substantive research has supported this contention. Research reports to date present overwhelming evidence that tests used in the selection process do not predict the criterion of grades at any practical level, including a report concerning LSAT (Barbara Pitcher, 1965) published by Educational Testing Service.⁴⁵

One major outcome of the study was that the "LSAT or a combination** of LSAT, WA, and GB do not predict law school grades (GPA) for practical purposes of selection, placement or advisement for candidates seeking entrance into law school (correlations of approximately the .40 level). When LSAT is combined with First 30 hours of law school course grades, it predicts further success in law school at a sufficient level (.68) to be useful for further advisement and placement. The relationship between First 30-GPA and Last 30-GPA is approximately the same as the multiple relationship of .68 above. This strongly suggests that any comprehensive test of achievement or intelligence would serve as

well as the LSAT as a predictor of success in law school."⁴⁶

Despite the fact that ETS's own studies conclude that the LSAT is less than a fool-proof predictor, it must be acknowledged that some way of establishing requirements had to be promulgated. The law schools are not alone in their dependence on some form of admissions (and exclusionary) device. Americans have come to expect testing. The fact that some definitive scientific answer about the best way, or ways, to measure human abilities and potentialities is still remote will not stop the process.

Mr. DeFunis' strong dependence on the LSAT should be moderated by the fact that "just as minority students have been saddled with unnecessary and essentially false labels, so has the American public been saturated with an almost spiritual faith in the value of a high SAT or LSAT score, and in the damnation that must follow (and in too many instances has followed) a low score."⁴⁷ A further tempering fact: if data were made public, it would probably show that minority students are scoring much higher on the LSAT today than their professors did 10 or 15 years ago.

Would one conclude in the face of such data that today's minority students (or majority students for that matter) are brighter and more able than their professors? Or do we conclude that this result is due to greater exposure to the material that the test is intended to measure? How would many of today's law professors, who did not have to face competition from minority students and non-minority women, fare on the basis of their test scores in today's competition? The question calls for a

**The notion that the more that is known about a person the better to know what to expect from him is generally held to be a good "rule of thumb." In the scientific sense, it may or may not be a good rule. This short explication is intended for the guidance of the reader when he presently reads about the combination of scores or variables to predict other scores of variables.

45. T. Goolsby, A Study of the Criteria For Legal Education and Admission to the Bar, 20 Journal of Legal Education, 175 (1967).

46. *Id.* at 177.

47. *supra*, note 27.

hind-sight conjecture and speculation; but it should focus on the complexity, intricacy and limitation inherent in any attempt to measure human creativity, depth and subtlety.

Another cautionary note was sounded by Peter A. Winograd, Director of Law Programs of Educational Testing Service. Writing in *American Bar Association Journal*, he warned that numbers alone do not measure potential.

"The list of possible variables can be lengthy, the time consumed in evaluating them will be substantial, and the final decision will be harder to reach than if numerical statistics are given determinative weight. The effort and expertise invested in this process ultimately will produce a vibrant class with a collaborative potential beyond what indexes alone can measure.

Since most admissions officers and committees charged with the selection of entering students act with this in mind, class profiles usually show that acceptances are to some extent distributed along a G.P.A./L.S.A.T. continuum rather than appearing only at the top. At some point, of course, it does become essentially impossible for personal factors to compensate for unpromising objective credentials, for the over-all correlation of L.S.A.T. scores and undergraduate grades the law school performance can raise questions of academic survival. This aside, if the demand for access to legal education reaches a plateau, as now appears likely, then the solution to the supposed admissions crisis may hinge more on improving the spread of applicants among law schools than on simply creating more first-year places."⁴⁸

Dean Russell A. Simpson, Director of Admissions and Financial Aid at Harvard Law School, has written that whereas many individuals assume that an applicant to a law

school is judged purely on the basis of high grades and test scores, there is not a law school admissions committee in America that has ever adhered to this principle. Indeed, if high college grades and test scores were the only qualifications for admission there would be no need whatsoever for admissions committees. The class for any given year could simply be determined by computer. But an enormous amount of thought, discussion, analysis and intuition goes into selecting members for a class, partly because *no* law school considers any one fact about an applicant an exclusive index of his potential for legal study. A combination of factors must be taken into account in determining the *kind* of excellence which qualifies a student for study at Harvard.⁴⁹

In 1974, one hundred and eleven years after Abraham Lincoln initiated the first affirmative action program by signing and issuing a Presidential Executive Order — The Emancipation Proclamation — the U. S. Supreme Court has been asked, through *DeFunis v. Odegaard*, if this nation has the internal capability to provide equal treatment of equal laws to all of its citizens; and whether it is ready to fully develop the concept of equality and to institutionalize the practice of fairness.^{***}

48. P. Winograd, 59 *Law School Admissions: A Different View*, 865 *American Bar Association Journal*, (August 1973).

49. Newsletter, Association of American Law Schools, February 1972.

^{***}Mr. Leonard's comments were written prior to the Supreme Court's adjudication of *DeFunis*. In a recent interview he emphasized that the importance of the issues raised by *DeFunis* and focused upon in his article has not been abated by the Supreme Court's "non-decision." He added that soon another *DeFunis* situation will arise and perhaps, then, the court will choose to decide the case on its merits. Until that time, the issues remain alive.